CORRECTED COPY

No. 83-615

In the Supreme Court of the United States

October Term, 1983

SYLVESTER MARX, Individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,

Petitioner,

vs.

CENTRAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Do national banks as part of the business of banking, have the right to borrow unlimited short term monies to finance the purchase for their own accounts, an unlimited amount of long term U.S. Bonds, subject only to the rule of prudence of the Comptroller of the Currency, 12 C.F.R. 1.4 et seq., and thereby have the concomitant right to speculate in U.S. Bonds as part of the business of banking for which no private right of action, directly or derivatively may be brought by a stockholder of its bank holding company, for its benefit against the directors who served both the bank and bank holding company, for the loss caused by their speculation and their concurrent contravention of the National Banking Act, including Chapter 2 and the Bank Holding Company Act?

2. Does the enactment of the Bank Holding Company Act, obliterate all private right of actions for the benefit of or against bank holding companies their directors and officers thereof, that existed prior to its enactment, thereby immunizing bank holding companies, their directors and officers from suit in Federal Court for breach of fiduciary duty to their shareholders and denial of their pre-emptive rights?

PARTIES

The Petitioner to this action is:

SYLVESTER MARX, individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated

The Respondents to this action are:

CENTRAN CORPORATION

CENTRAL NATIONAL BANK OF CLEVELAND

JACK C. ROTHWELL, Executive Vice-President Central National Bank of Cleveland and Chairman of the Credit Policy Committee of Centran Corporation

JOHN A. GELBACH, Officer of Central National Bank of Cleveland, Director and Officer of Centran Corporation

WILSON M. BROWN, Jr., President of Central National Bank of Cleveland, Director and President of Centran Corporation

JAMES M. LARGE, Jr., Executive Vice-President Central National Bank and Chairman of Credit Policy Committee of Centran Corporation

GORDON J. SEVOLD, Senior Vice-President Central National Bank and Treasurer of Centran Corporation

OTES BENNET, Jr., Director of
Centran Corporation

GLENN R. BROWN, Director of
Centran Corporation

JOSEPH T. GORMAN, Director of
Centran Corporation

STEPHEN R. HARDIS, Director
of Centran Corporation

WILLIAM F. HAUSERMAN, Director of
Centran Corporation

ALBERT M. HIGLEY, Jr., Director of
Centran Corporation

GEORGE S. LOCKWOOD, Jr., Director of
Centran Corporation

JOHN J. LOFTUS, Director of
Centran Corporation

ROBERT D. McCREERY, Director of
Centran Corporation

JAMES S. REID, Jr., Director of
Centran Corporation

KARL H. RUDOLPH, Director of
Centran Corporation

WARD SMITH, Director of
Centran Corporation

RENOLD D. THOMPSON, Director of
Centran Corporation

ERNEST M. WULIGER, Director of
Centran Corporation

RULE 28.1 STATEMENT

Subsidiaries of Centran Corporation:

Central National Bank, Cleveland, Ohio

Centran Bank of Akron, Akron, Ohio

Richland Trust Corporation, Mansfield, Ohio

Franklin Bank, Columbus, Ohio

Farmers' and Savings Bank, Loudonville, Ohio

Sutton State Bank, Attica, Ohio

Investor's Income Insurance Co., Dallas, Texas

Non Bank Subsidiaries:

Colonial Financial Services, Inc., Birmingham, Alabama

Former Subsidiaries of Centran Corporation:

C.F.S. One, Inc.

People's Investment Corporation

Major Finance Corporation

Protective Loan Corporation

Security Capital Leasing, Inc.

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No.

In the Supreme Court of the United States

October Term, 1983

SYLVESTER MARX, Individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
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For the Sixth Circuit

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio, Eastern Division, appears in the appendix hereto.

JURISDICTION

The final judgment of the District Court for the Northern District of Ohio, Eastern Division, was entered on July 22, 1983. A Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed August 18, 1983. This Petition For Writ Of Certiorari has been filed subsequent to the foregoing Notice of Appeal, but prior to any final judgment of the Sixth Circuit, Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(e) and 28 U.S.C. § 1291.

STATUTES AND REGULATIONS INVOLVED

12 U.S.C. § 1, 12 U.S.C. § 24(7), 12 U.S.C. § 82 (repealed October 15, 1982), 12 U.S.C. § 84(8), 12 U.S.C. § 93(a), 12 U.S.C. § 93(b), 12 U.S.C. § 1842(d), 12 U.S.C. § 1849(a), 31 U.S.C. § 3102, 12 C.F.R. § 1.4, 12 C.F.R. § 7.1130, 12 C.F.R. § 7.1131, and 12 C.F.R. § 7.7518 all appear in the appendix hereto.

STATEMENT OF THE CASE

Central Bank, a national bank, with a borrowing potential of $71,000,000 based on its capital and surplus in 1980 bought $307,000,000 of high yield U.S., state and municipal bonds for its own account financed with short term borrowed money from the surplus cash flow at the Federal Reserve Bank, with the plan of selling them at a profit as soon as long term interest rates fell. Unfortunately, it lost $50,000,000 while waiting.

Central Bank was forced to recapitalize to continue the business of banking, at the expense of the shareholders of Centran, the bank holding company which owned 100% of Central Bank's stock. Centran recapitalized by diluting the company stock through the issue of warrants to Marine Midland Bank in a $70,000,000 stock transaction prohibited by 12 U.S.C. § 1842(d), damaging Centran's shareholders in their pre-emptive rights.

Central Bank, a national bank, doing business exclusively in Ohio, formed a bank holding company, Centran, a Delaware Corporation, with the Comptroller of Currency and Federal Reserve Board of Governor's approval. There is no authority in either the National Banking Act or Bank Holding Company Act to permit

this. Centran, in recapitalizing, denied pre-emptive rights to shareholders of Centran's common, on the pretext that though no mention of pre-emptive rights was made in the agreement of and exchange of Central Bank's stock for Centran's stock, the Delaware law, which vitiates pre-emptive rights under these circumstances, applies rather than the Ohio law.

The Petitioner brought action for the benefit of Centran Corp., a bank holding company and Central Bank, its wholly owned subsidiary and against the directors and officers thereof, for damages sustained by Petitioner and others similarly situated, that were sustained as a result of the Respondents contravening the National Banking Act, the Bank Holding Company Act and the Pre-emptive Rights Doctrine. Petitioner also brought a direct class action for denial of pre-emptive rights.

The thrust of Petitioner's complaint was rooted in the Respondents' breach of their fiduciary duty to Petitioner in speculating in U.S. Bonds in contravention of the National Banking Act and breach of fiduciary duty in recapitalizing by the dilution of the common stock in contravention of the Bank Holding Company Act and Pre-emptive Rights Doctrine. Petitioner has contended that these actions were authorized under 12 U.S.C. § 1849(a) and the Federal Common Law.

Discovery was had. Stipulations were entered into. The Respondents filed a Motion for Summary Judgment as to Count One; Petitioner filed a Motion to Limit the Scope of the Summary Judgment to the issue of whether there was a class action and filed a Brief supporting the Petitioner's theory, that a class action existed. The District Court found that no class action existed and dismissed the class action. The court then dismissed the derivative

action, stating that the reasons for the dismissal of the class action justified the dismissal of the derivative action. The court then dismissed the pendent claims for a class action and derivative action without prejudice.

The dismissal without prejudice as to the state pendent claims seemingly gives the Petitioner the right to file in state court, but since the National Banking Act and the Bank Holding Company Act is an integral part of the defense to the complaint, it is unlikely that jurisdiction would lie in the state court or alternatively the case would be removed to Federal Court. Breach of fiduciary duty in this case, as to speculation in U.S. Bonds is strictly a federal question, as is manifest from the 44 page printed opinion of Judge Manos, as it appears in the appendix herein.

The Petitioner duly and seasonably filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit and is docketed as Case No. 83-3602. The Sixth Circuit has notified the Petitioner that his Brief is due on October 24, 1983.

The decision for which the Writ of Certiorari is addressed is from the order of the United States District Court granting Respondents' joint motion for partial summary judgment as to Count 1 of the Amended Complaint and the dismissal of Counts 2 and 3 of the Amended Complaint. Count 3 of the Amended Complaint being dismissed without prejudice and the denial of the Petitioner's motion to limit the scope of Respondents' motion for partial summary judgment. The decision is by the Honorable Judge John M. Manos of the Northern District of Ohio, Eastern Division on July 22, 1983.

REASONS FOR GRANTING THE WRIT

1. NATIONAL BANKS AND THEIR BANK HOLDING COMPANIES WITH THE COMPTROLLER OF THE CURRENCY HAVE DEVELOPED THE UNLIMITED RIGHT OF NATIONAL BANKS TO PURCHASE U.S. BONDS FOR THEIR OWN ACCOUNTS, INTO AN UNLIMITED RIGHT TO BORROW THEREFORE, RESULTING IN A PERVASIVE OPERATIONAL "SPECULATIVE" SCHEME, WITH IRREPARABLE CONSEQUENCES TO THE BANKING SYSTEM THAT WILL CONTINUE UNTIL THIS ISSUE IS ADDRESSED BY THIS COURT.

> ". . . no authority, express or implied, has ever been conferred by the statutes of the United States upon a national bank to engage or promote a purely speculative business or adventure. . . ."

It is doubtful the foregoing principle articulated in *First National Bank of Ottawa v. Converse*, 200 U.S. 425 at page 439, has been altered.

Yet the United States District Court below has sanctioned speculative activity by a national bank and its bank holding company by denying any remedy to the stockholders of the bank holding company by his opinion that any action in regard to such speculation, is now within the sole regulatory authority of the Comptroller of the Currency.

The District Court sanctioned the unlimited short term borrowing of Central Bank in an amount of $307,000,000 to finance its purchase of long term U.S., state and municipal bonds for its own account, when its borrowing authority was only $71,000,000. Central Bank lost $50,000,000

attributable to the foregoing scheme. It had no intent to invest in U.S. Bonds because of its obvious lack of capital to pay for them.

To cover the cost of payment for the purchase, it used a device where it placed the purchase of U.S. Bonds with the Federal Reserve Bank and borrowed the surplus monies on a continuing daily basis from other banks that they had placed in the Federal Reserve Bank.

Central Bank's speculation was that its enormous borrowing was justified by betting that its purchase of high yield, long term U.S. Bonds would in a short period of time become more valuable by a fall in the long term bond market interest rate and/or the short term interest rate would remain below the interest rate payable on the U.S. Bonds it purchased.

The District Court has ruled that the speculation is strictly under the aegis of the Comptroller of the Currency who has sole and exclusive authority to act upon the matters alleged in the Petitioner's Amended Complaint and the uncontroverted facts before the court. The court held, in effect, that there was no private right of action for breach of fiduciary duty against the directors and officers of a bank holding company for its benefit or against the bank holding company itself, either directly or derivatively where the bank holding company owned 100% of the Central Bank stock and the directors of the bank holding company and Central Bank acted in concert through an identical interlocking directorate.

The court in its lengthy opinion declined to deal with 12 U.S.C. § 1849(a) which Petitioner had raised in his Brief as a savings provision. By declining to deal with this statute the District Court has effectively held that the enactment of the Bank Holding Company Act precludes any private right of action by a shareholder of a bank

holding company for its benefit or against it and its directors and officers, either directly or derivatively. The District Court did find however, that the bank holding company did have a private right of action as a shareholder of its bank for violations of Chapter 2 of the National Banking Act, pursuant to 12 U.S.C. § 93(a). The District Court found that 12 U.S.C. § 93(b) when read *in pari materia* with 12 U.S.C. § 93(a) did not confer any private rights whatsoever, even for the bank holding company as a shareholder.

The Petitioner's evidence clearly establishes that 12 U.S.C. § 82 was violated by Central Bank in 1980 and 1981 which shows that Central Bank's borrowing limit was at $71,000,000 based on its capital and surplus when it borrowed $307,000,000 to fund and finance the purchase of $307,000,000 of long term U.S., state and municipal bonds. The court held that the repeal of 12 U.S.C. § 82 two years later made it inapplicable to Petitioner's case, but even if it was applicable the Comptroller of the Currency's regulations 12 C.F.R. § 7.1130, 12 C.F.R. § 7.1131 and 12 C.F.R. § 7.7518 made 12 U.S.C. § 82 inoperative.

Thus national banks operating from the perspective of the District Court's opinion, beautifully articulated by the Respondents, have created for themselves the right to borrow unlimited funds to speculate in the U.S. Bond market subject only to the apparent but illusory authority of the Comptroller of the Currency.

The purchase of the U.S. Bonds for Central Bank's own account with excessive borrowed funds for speculative purposes was obviously no secret to the Comptroller of the Currency due to his frequent and constant auditing of the bank. Thus it was done with his tacit approval.

The Comptroller of the Currency's undefined Rule of Prudence, 12 C.F.R. § 1.4 which limits the right of purchase,

in no way limits the right to borrow. The Comptroller of the Currency cannot very well enforce the rules of prudence because of the chilling effect it has on the purchase of U.S. Bonds and because it conflicts with the statutory duty of the Secretary of the Treasury, under whose direction he operates to issue and sell U.S. Bonds on the credit of the United States Government. 12 U.S.C. § 1, provides that the Comptroller of the Currency shall perform his duties under the general directions of the Secretary of the Treasury. 31 U.S.C. § 3102 authorizes the Secretary of the Treasury to issue U.S. Bonds and sell them on the credit of the United States Government.

Consequently, there is no viable regulation of a national bank's speculation in U.S. Bonds with borrowed monies where such bank is a wholly owned subsidiary of a bank holding company, unless shareholders of a bank holding company can bring an action for breach of fiduciary duty.

There is no direct statutory authority under the National Banking Act for a bank to borrow money. The borrowing of money by a bank, though not illegal is out of the course of ordinary and legitimate banking business. See *Western National Bank v. Armstrong*, 152 U.S. 346, 38 L. Ed. 470. 12 U.S.C. § 24(7) has been interpreted by the court as allowing banks to borrow money under the incidental power necessary for the business of banking. This right to borrow incidental to the business of banking was limited by 12 U.S.C. § 82 to the bank's capital plus 50% of its surplus. It did not except borrowing for the purchase of U.S. Bonds for the bank's own account for investment, trading or speculating, nor does it authorize borrowing for the bank's own account. Neither did it empower the Comptroller of the Currency to modify 12 U.S.C. § 82 in any way, manner, shape or form.

The Comptroller, without any authority or factual case before him prior to 1975, sua sponte issued an interpretative ruling in 12 C.F.R. § 1130 and 12 C.F.R. § 1131 exempting banks from 12 U.S.C. § 82 when it borrows funds from other banks through the Federal Reserve Bank. The Comptroller of Currency, thus has sanctioned and promoted the operational speculative scheme, herein not as to the case at bar, but for the entire national banking industry.

National banks have assumed that they have as "incidental power," of 12 U.S.C. § 24(7), the right to borrow short term monies on a daily basis from other banks, the surplus funds that these banks have placed in the Federal Reserve Bank, to finance the purchase of long term U.S. Bonds. They have claimed as authority for their right to borrow for their own accounts, enormous sums of monies, many times their capital assets and surplus, the Comptroller of the Currency's regulations 12 C.F.R. § 7.1130, 12 C.F.R. § 7.1131 and 12 C.F.R. § 7.7518, when it is apparent and patent that they can not repay the loan financing for their purchase of U.S. Bonds from their capital assets and surplus should they sustain a loss without seriously impairing their ability to function as a bank.

These regulations by the Comptroller of the Currency provide that the monies borrowed are not subject to 12 U.S.C. § 82, but are to be considered as a purchase and sale. 12 U.S.C. § 82 limited the borrowings of a bank, subject to exceptions not relevant here, to its capital and surplus. 12 U.S.C. § 82 contains absolutely no authority for the Comptroller of the Currency to enact any regulations whatsoever in regard thereto. Notwithstanding, the Comptroller of the Currency by his foregoing enactments of regulations, obliterated the substance of 12 U.S.C. § 82 in this regard.

From reliable sources and information it is believed that other national banks have engaged in the same practice and will continue to engage in the same practice unless such activity is declared illegal by this court.

The questions presented are of first impression and are of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in the Supreme Court of the United States.

CONCLUSION

Petitioner urges this Court to grant his Petition For Writ Of Certiorari to review the decision of the United States District Court, for the Northern District of Ohio immediately and forthwith prior to the consideration of this case by the United States Court of Appeals for the Sixth Circuit, in order that the current practice of speculation by national banks and their holding companies hereinabove detailed may be curbed, curtailed and declared illegal.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 22, 1983)

Case No. C82-2720

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SYLVESTER MARX, etc.,
Plaintiff,

v.

CENTRAN CORPORATION, etc., *et al.*,
Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date the defendants' joint motion for partial summary judgment is granted; the plaintiff's motion "to limit [the] scope" of the defendant's motion is denied and the remainder of the complaint is dismissed. Such dismissal is without prejudice to the claims alleged in count three of the amended complaint.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT

(Filed July 22, 1983)

Case No. C82-2720

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SYLVESTER MARX, etc.,
Plaintiff,

v.

CENTRAN CORPORATION, etc., *et al.*,
Defendants.

MEMORANDUM OF OPINION

On October 8, 1982 plaintiff, Sylvester Marx, filed the above-captioned case alleging violations of 12 U.S.C. §§ 24 and 84 and 12 C.F.R. § 1.4 by the following defendants: (1) Centran Corporation (hereinafter, Centran); (2) Central National Bank of Cleveland (hereinafter, CNB); (3) Jack C. Rothwell; (4) John A. Gelbach; (5) Wilson M. Brown, Jr.; (6) James M. Large, Jr.; (7) Gordon J. Sevold; (8) Otes Bennet, Jr.; (9) Glenn R. Brown; (10) Joseph T. Gorman; (11) Stephen R. Hardis; (12) William F. Hauserman; (13) Albert M. Higley, Jr.; (14) George S. Lockwood, Jr.; (15) John J. Loftus; (16) Robert D. McCreery; (17) James S. Reid, Jr.; (18) Karl H. Rudolph; (19) Ward Smith; (20) Renald D. Thompson, and (21) Ernest M. Wulliger. On January 26, 1983 Marx filed an amended complaint which, in addition to the statutes and regulation

cited above, alleges violations of 12 U.S.C. §§ 82, 375(b), 1842(d) and 1847. On March 3, 1983 the parties submitted stipulations of fact. On March 10, 1983 the defendants filed a joint motion for partial summary judgment. On May 25, 1983 Marx filed a motion "to limit [the] scope" of the defendants' motion. For the reasons which follow the defendants' joint motion is granted, the motion filed by Marx is denied and the remainder of the complaint is dismissed.

The amended complaint contains three (3) counts: (1) count one alleges a class action on behalf of all holders of common stock of Centran; (2) count two alleges a derivative action "for the benefit of Centran and its wholly owned subsidiary [CNB]"; and (3) count three alleges a pendent claim of breach of fiduciary duty under the laws of Ohio. All counts are premised on the same facts, a synopsis of which follows below.

In 1980 CNB maintained a policy of asset management which permitted an imbalance or "gap" between long-term fixed assets and liabilities and short-term fixed assets and liabilities. This "gap" was managed according to forecasts regarding interest rates. When such forecasts predicted that interest rates would peak and thereafter decline, CNB would purchase securities for its own account with medium and/or long-term dates of maturity at rates of return that were fixed. Such purchases were financed from the proceeds of liabilities with short-term dates of maturity. It was expected that as interest rates declined the short-term liabilities would be "rolled over" at a lower cost, the securities purchased would continue to earn a high rate of return and, therefore, CNB would earn a profit. Obviously, the policy encompassed some risk. If the forecast regarding interest rates proved incorrect and rates on short-term liabilities began to rise, then the cost of the debt could equal and/or exceed the rates of return

on the securities purchased. Although it is unquestioned that if such an upward spiral occurred CNB could sell the securities to reduce the "gap" and restore liquidity, it is equally clear that the market value of the securities would decline as interest rates rose and, therefore, CNB would suffer a loss on any such sale. This is precisely what occurred to CNB's investment portfolio in late 1980 and throughout 1981. The parties stipulate that ". . . as a consequence of negative carrying costs and . . . losses from selling securities at market prices lower than cost/book value . . . damages sustained by CNB . . . exceeded Fifty Million Dollars." Stipulations of Fact, pp. 6-7.

With regard to the parties the following facts are also stipulated:

(1) In 1978 Marx purchased two hundred (200) shares of common stock of Centran. He is one of approximately nine thousand (9,000) shareholders who own over four million (4,000,000) shares of authorized and issued common stock.

(2) Centran is a Delaware corporation which is qualified to do business in Ohio. It is a "bank holding company" as that term is defined in 12 U.S.C. § 1841(a) and owns all of the common stock of CNB.

(3) CNB is a national banking association chartered by the United States. It is a member of the Federal Reserve System and is insured by the Federal Deposit Insurance Corporation (hereinafter, FDIC).

(4) Jack C. Rothwell was an Executive Vice President of CNB and Chairman of the Finance Committee of Centran. He was also manager of the Department of Asset and Liability Management for each organization.

(5) John A. Gelbach was the Chairman of the Board of Directors for each organization. From 1979 until May,

1981 he was also the Chief Executive Officer of Centran. Currently, Gelbach is retired.

(6) Wilson M. Brown, Jr., was President of each organization. In 1979 he became Chief Executive Officer of CNB and in June, 1981 Chief Executive Officer of Centran. He is also a director of each organization.

(7) James M. Large, Jr., was an Executive Vice President of CNB and Manager of the Department of Corporate Banking. In April, 1980 he became Chairman of the Credit Policy Committee of Centran.

(8) Gordon J. Sevold was a Senior Vice President for Financial Planning and Control of CNB. He was also Treasurer of Centran.

(9) From 1979 through 1981 Otes Bennet, Jr., Joseph T. Gorman, Stephen R. Hardis, William F. Hauserman, Albert M. Higley, Jr., George S. Lockwood, Jr., John J. Loftus, Robert D. McCreery, James S. Reid, Jr., Karl H. Rudolph, Ward Smith, Renold D. Thompson and Ernest M. Wuliger were directors of each organization. In 1982 Lockwood and Wuliger did not stand for reelection. Currently, all of the other directors remain on each board.

(10) In 1980 Glenn R. Brown was elected a director on the boards of each organization. Although he did not participate in any of the investment decisions of the Board of Directors of CNB, he did ratify the decisions to liquidate the investment portfolio in 1981 and 1982.

Finally, the parties also submitted certain stipulations which concern a transaction between Centran and Marine Midland Banks, Inc. (herinafter, MMBI), which is not a party to this action.[1] On March 5, 1982 Centran issued

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1. Similar to Centran, however, MMBI is a "bank holding company" under 12 U.S.C. § 1841(a). It is incorporated in a state other than Ohio and maintains its principal place of business in New York.

five hundred thousand (500,000) shares of preferred stock which were purchased by MMBI for $70,000,000. MMBI also received a warrant to purchase 2,333,333 shares of common stock at $30. per share.

Marx contends that the court should ". . . restrict the scope of the [the] [d]efendants motion . . . to the issue [of] whether [he] and his class have a direct . . . class action and not in any way rule on the merits." For the reasons which follow the court finds the contention to be without merit.

Fed. R. Civ. P. 23(c)(1) provides as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140 (1974), the United States Supreme Court held that what the district court had termed a "preliminary mini-hearing" on the merits of the plaintiffs' claim was not permitted under this rule. Specifically, the Court held:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.
>
> He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the

> class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action. . . ."

417 U.S. at 177-78, 94 S. Ct. at 2152. Thus, the precise question presented by Marx's motion is whether *Eisen* held *sub silentio* that any consideration of the merits of a case before a determination of whether it may be maintained as a class action is impermissible. The court holds the question should be resolved in the negative.

In *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 260 (N.D. Ill. 1978), the court was confronted with the same issue and held that when ". . . defendants' summary judgment motions allow the court to explore and define the proper range of judicial inquiry on the allegations of the complaint, *disposition of those motions before certification is appropriate.*" (Emphasis added). *Accord*: *Haas v. Pittsburgh National Bank*, 381 F. Supp. 801, 803 (W.D. Pa. 1974), *aff'd (rev'd) on other grounds*, 526 F.2d 1083 (3d Cir. 1975), ". . . a district court may consider the merits of a plaintiff's case in an action denominated as a class action by ruling upon a motion for summary judgment (or a motion to dismiss) prior to ruling upon a motion for class determination . . .". (Footnote omitted). A contrary rule, ". . . if carried to a logical extreme, would require certification to precede even disposition of motions under Rule 12." *Garcia v. Rush-Presbyterian-St. Luke's Medical Center, supra*, 80 F.R.D. at 260. Since such an "extreme" would require the court "to engage in vain and useless effort merely for the sake of form," *Haas v. Pittsburgh National Bank, supra*, 381 F.Supp. at 806, Marx's motion "to limit [the] scope" of the defendants' joint motion for summary judgment is denied.

12 U.S.C. § 93(a) provides as follows:

> If the directors of any national banking association *shall knowingly violate, or knowingly permit* any of the officers, agents, or servants of the association to violate any of the provisions of *this chapter,* all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, *its shareholders, or any other person,* shall have sustained in consequence of such violation.

(Emphasis added). The defendants' first contention is that the statute does not provide a private right of action to shareholders of a national bank. For the reasons which follow the court holds the defendants' first contention to be without merit.

In *Chesbrough v. Woodworth,* 244 U.S. 72, 76, 37 S. Ct. 579, 582 (1917), the United States Supreme Court affirmed the following ruling by the Court of Appeals for the Sixth Circuit:

> The general demurrer was rightly overruled. The making and publishing of the reports are not merely for the information of the Comptroller, but are to guide the public, and he who buys stock in a bank in reliance upon the reports has a right of action under § 5239, Rev.Stat. (Comp.Stat.1916, § 9831) [section 93(a)], against any officer or director who, knowing its falsity, authorizes such report.

The general demurrer was to a complaint in which a shareholder alleged that directors of national bank violated the provisions of what is currently 12 U.S.C. § 161 which requires that certain reports be made to the Comptroller of Currency. Premised on *Chesbrough*, the Court of Appeals for the Ninth Circuit has held that "it is beyond dispute that under proper circumstances Section 93 creates a direct cause of action by the shareholders against the directors of a national bank." *Harmsen v. Smith*, 542 F.2d 496, 500 (9th Cir. 1976). *Accord*: *Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979), "Individual depositors may sue in their own right . . . if they have suffered a wrong that is distinctly theirs and not common to all"; *Spalitta v. National American Bank of New Orleans*, 444 F.2d 291 (5th Cir.), *cert. denied*, 404 U.S. 883, 92 S. Ct. 212 (1971), (shareholders' derivative and class action); *Seiden v. Butcher*, 443 F. Supp. 384 (S.D. N.Y. 1978), (shareholders' derivative action). Other courts, however, have held that no such standing exists. *See*: *Russell v. Continental Illinois National Bank & Trust Co., of Chicago*, 479 F.2d 131 (7th Cir.), *cert. denied*, 414 U.S. 1040, 94 S. Ct. 541 (1973), (investors in an "open-end mutual fund" established by the bank); *Gollar v. Daniels & Bell, Inc.*, 533 F. Supp. 1021 (S.D.N.Y. 1982), (shareholders' derivative action); *Stein v. Galitz*, 478 F. Supp. 517 (N.D. Ill. 1978), (private developer of federally subsidized rental housing); *Valente v. Dennis*, 437 F. Supp. 783 (E.D. Pa. 1977), (shareholders of a corporate borrower).

In *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975), the United States Supreme Court held that four (4) factors are relevant to determine whether a private right of action should be implied under any federal statute. Specifically, the court held:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several

factors are relevant. *First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L.Ed. 874 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? *Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453, 458, 460, 94 S. Ct. 690, 693, 694, 38 L.Ed.2d 646 (1974) (*Amtrak*). *Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff* : *See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 423, 95 S. Ct. 1733, 1740, 44 L.Ed.2d 263 (1975); *Calhoon v. Harvey,* 379 U.S. 134, 85 S. Ct. 292, 13 L.Ed.2d 190 (1964). *And finally, is the cause of action one traditionally relegated to state law,* in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler,* 373 U.S. 647, 652, 83 S. Ct. 1441, 1445, 10 L.Ed.2d 605 (1963); *cf. J. I. Case Co. v. Borak,* 377 U.S. 426, 434, 84 S. Ct. 1555, 1560, 12 L.Ed.2d 423 (1964); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 394-395, 91 S. Ct. 1999, 2003-2004, 29 L.Ed.2d 619 (1971); *id.*, at 400, 91 S. Ct. at 2006 (Harlan, *J.*, concurring in judgment).

422 U.S. at 78, 95 S. Ct. at 2088. (Emphasis added). The Court so held because "[t]he increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent. . .". *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 377, 102 S. Ct. 1825,

1838-39 (1982). (Footnote omitted). Although *Cort* "refined the implied remedy doctrine to provide a more efficient means of determining whether a federal statute includes a private right of action," *Kaschak v. Consolidated Rail Corp.*, ... F.2d ....., No. 81-3383, Slip op. at 24 (6th Cir. May 26, 1983), (Celebrezze, J., concurring in judgment), the defendants do not cite and this court is unaware of any authority which holds that it overruled any previous decision which implied such a right. Therefore, in light of *Chesbrough v. Woodworth, supra,* this court holds that shareholders may maintain a private right of action against directors of a national bank under 12 U.S.C. § 93(a) for any knowing violations of "any of the provisions of this chapter."[2] Since 12 U.S.C. § 93(a) provides that such an action may be maintained against directors only and Marx has stipulated that Rothwell, Large and Sevold were never directors, the complaint against them, to the extent it alleges knowing violations of "any of the provisions of this chapter," is dismissed for failure to state a claim upon which relief can be granted. *Conley v. Gibson,* 355 U.S. 41, S. Ct. 99 (1957).

With regard to the defendants who are directors, Marx alleges that they committed knowing violations of 12 U.S.C. §§ 24, 82 and 84, all of which are "provisions of this chapter" for the purpose of 12 U.S.C. § 93(a). The defendants contend that they are entitled to summary judgment under each statute. For the reasons which follow the court finds the defendants' contention persuasive.

12 U.S.C. § 24 provides in pertinent part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution

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2. Subject matter jurisdiction may be implied under either 28 U.S.C. § 1331 or 28 U.S.C. § 1337(a).

of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, *it shall have power*—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. *The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes

> and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. *The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof,* . . .

(Emphasis added). Although it is uncertain "whether the enumeration of powers contained in § 24 itself imposes a duty, the breach of which will form the basis of personal liability of the directors," *Stein v. Galitz, supra,* 478 F. Supp. at 521, the court need not resolve the issue in this case because the parties have stipulated that all of the securities purchased by CNB were "type I securities" which, as a matter of law, are not subject to any of the limitations or restrictions contained in the statute. *See*: 12 C.F.R. § 1.3(c).[3] Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 24 is granted.

The second statute that Marx claims the defendants knowingly violated is 12 U.S.C. § 82. This statute was

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3. 12 C.F.R. § 1.3(c) provides as follows:

> *The term "Type I security" means a security which a bank may deal in, underwrite, purchase and sell for its own account without limitation.* These include obligations of the United States, general obligations of any State of the United States or any political subdivision thereof and other obligations listed in paragraph Seventh of 12 U.S.C. 24.

(Emphasis added).

repealed seven days after Marx filed his complaint by the Garn-St. Germain Depository Institutions Act of 1982. Pub. L. No. 97-320, Title IV, § 402, 96 Stat. 1510 (October 15, 1982).

In *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016 (1974), the United States Supreme Court held that "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Accord*: *Harper-Grace Hospitals v. Schweiker*, 691 F.2d 808, 811 (6th Cir. 1982). In this case the court finds that neither limiting condition exists.

The legislative history which concerns the repeal of 12 U.S.C. § 82 provides as follows:

> *Section 402* repeals 12 U.S.C. § 82, which establishes borrowing limitations for national banks. Statutory limitations on the liabilities of national banks have remained essentially unchanged since original enactment of the National Bank Act of 1864. Since that time, however, the nature of the banking business—especially the manner in which banks are funded—has altered considerably. *The rigid limitations of § 82 adversely restrain bank flexibility and competitively disadvantage national banks.* Many states have no such statutory restraints upon state-chartered institutions.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 60, *reprinted in* [1982] U.S. Code Cong. & Ad. News 3054 at 3114. (Emphasis added). It is unquestioned that Congress found 12 U.S.C. § 82 to be anachronistic. Therefore, the court finds the legislative history supports holding that Marx cannot state a claim under the statute because of repeal.

The court finds further that such a holding does not "result in manifest injustice" because even if Congress did not repeal the statute Marx's complaint would not state a claim under it.

Before it was repealed, 12 U.S.C. § 82 provided as follows:

> No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding *the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of its unimpaired surplus fund, except on account of demands of the nature following*:
>
> First. Notes of circulation.
>
> Second. Moneys deposited with or collected by the association.
>
> Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
>
> Sixth. Liabilities incurred under the provisions of the Federal Deposit Insurance Act.
>
> Seventh. Liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad.
>
> Eighth. Liabilities incurred under the provisions of sections 1031-1033 of this title.

Ninth. Liabilities incurred on account of loans made with the express approval of the Comptroller of the Currency under paragraph (9) of section 84 of this title.

Tenth. Liabilities incurred under the provisions of section 352 of this title.

Eleventh. Liabilities incurred in connection with sales of mortgages, or participations therein, to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

Twelfth. Liabilities incurred in borrowing from the Export-Import Bank of the United States.

(Emphasis added). The parties have stipulated that the short-term liabilities incurred by CNB were of two (2) types: (1) "Federal Funds Purchased"; and (2) "Repos", which are defined as follows:

> *Federal Funds Purchased*: The Federal Reserve System requires all member banks to maintain on deposit in the Federal Reserve Bank a certain minimum amount. This minimum must be in place at the close of the banking day, to remain overnight. A member bank which has excess deposits overnight can sell them to another member overnight to make up a deficiency in the borrower's minimum. Banks generally sell or purchase "Fed. Funds" daily, and may do both in the same day to arrive at the nightly minimum. The Federal Reserve pays no interest on the member bank's deposit accounts, so that a bank which maintains excess deposits overnight loses interest earnings on those excess deposits. The structure of the "borrowing" is a Sale by the "lending" bank of some of its deposits to the "borrowing" bank which buys that deposit at the close of the day. The "bor-

rower" then sells the bank the purchased funds at the beginning of the next day, but pays back an additional charge for overnight usage which amounts to interest. The Federal Reserve does the bookkeeping based on wire confirmations.

. . .

Repos. The transaction called a "repo", for convenience, is formally structured as a Sale and Repurchase Agreement. A bank which in substance wants to borrow money for a short term, with full security to the lender, can sell the specified security at an agreed price (usually par) to a buyer who pays the full purchase price at once. The buyer then owns the security. At the time of sale the Bank agrees to repurchase the same security for a higher price at the end of a specified term of days or weeks. The difference in price can be translated into an annual interest rate. At the end of the specified term, the original seller buys back the security and pays the original buyer the higher price.

Stipulations of Fact, pp. 12-13.

Before 12 U.S.C. § 82 was repealed, 12 C.F.R. § 7.1130 provided as follows:

> When a bank purchases Federal Reserve funds from another bank, the transaction ordinarily takes the form of a transfer from a seller's account in a Federal Reserve Bank to the buyer's account therein, payment to be made by the purchaser, usually with a specified fee. *The transaction does not create on the part of the buyer* an obligation subject to 12 U.S.C. 84 or *a borrowing subject to 12 U.S.C. 82, but is to be considered a purchase and sale of such funds.* But see § 7.7365 for federal funds transactions between affiliates.

(Emphasis added). Similarly, 12 C.F.R. § 7.1131 provided:

> *The purchase or sale of securities by a bank, under an agreement to resell or repurchase at the end of a stated period is not a borrowing subject to 12 U.S.C. 82* nor an obligation subject to the lending limit of 12 U.S.C. 84.

(Emphasis added). Finally, 12 C.F.R. § 7.7518 provided:

> *For purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal funds purchased* (see § 7.1130) *obligations to repurchase securities sold* (see § 7.1131), or bills payable to the Federal Reserve (12 U.S.C. 82(5)). Accordingly, for purposes of § 14.5(b) of this chapter, a national bank's indebtedness or liability is determined without regard to such items. Also see §§ 7.7355 and 7.7530.

(Emphasis added). The court finds that these regulations were validly promulgated by the Comptroller of Currency and that they would have precluded Marx's complaint under 12 U.S.C. § 82 had it not been repealed. Accordingly, the defendant's joint motion for summary judgment on Marx's claim under 12 U.S.C. § 82 is granted.

The third statute which Marx claims the defendants knowingly violated is 12 U.S.C. § 84 which, provides in pertinent part as follows:

> (a)(1) *The total loans and extensions of credit by a national banking association to a person outstanding at one time* and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit *shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.*

(Emphasis added). Specifically, Marx claims that "[t]he borrowing of the monies by [CNB] for the purchase of United States, state and municipal bonds in excess of the statutory authority as well as the purchase of the bonds in and of itself, *constituted a loan from [CNB] to Centran and is in violation of 12 U.S.C. § 84. . . .*". Amended Complaint, p. 8, ¶ 23. (Emphasis added). The court finds Marx's claim to be without merit. It is undisputed that CNB borrowed funds from other banks which are members of the Federal Reserve system and used such funds to purchase securities for its own account. It is equally clear that Centran was not a party to any of the loans nor received any of the securities purchased. To construe either the debt incurred or the securities purchased as "loans" from CNB to Centran is inconceivable. Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 84 is granted.

Marx also claims that the defendants violated 12 C.F.R. § 1.4 which provides as follows:

> Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 or in this Part other than §§ 1.3(c), 1.3(g), 1.4, 1.8, 1.9, and 1.11. *Consequently, a bank may deal in, underwrite, purchase, and sell for its own account a security of Type I subject only to the exercise of prudent banking judgment. Prudence will require such determinations as are appropriate for the type of transaction involved.* For the purpose of underwriting or investment, prudence will also require a consideration of the resources and obligations of the obligor and a determination that the obligor possesses resources sufficient to provide for all required payments in connection with the obligations.

(Emphasis added). Since a private right of action, however, may be maintained under 12 U.S.C. § 93(a) only against directors who ". . . knowingly violate or knowingly permit [certain others] . . . to violate any of the provisions of this *chapter* . . .", (emphasis added), and not any *regulation* promulgated pursuant to it by the Comptroller of Currency, Marx states a claim *only* if a private right of action may be maintained under 12 U.S.C. § 93(b) which provides as follows:

> (1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates *any of the provisions of this title*, or any of the provisions of section 92a of this title, *or any regulation issued pursuant thereto*, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.
>
> (2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.
>
> (3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice

of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty

which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(Emphasis added). For the reasons which follow the court holds that such an action may not be maintained.

12 U.S.C. § 93(b) was added to the National Banking Act by the Financial Institutions Regulatory and Interest Rate Control Act of 1978. Pub. L. No. 95-630, Title I, § 103, 92 Stat. 3643 (1978). The legislative history of 12 U.S.C. § 93(b) does not indicate that Congress intended to create a private right of action in favor of anyone. Indeed, the legislative history reflects that the intended beneficiary of the statute was the Comptroller of Currency:

> *The banking agencies have made sound arguments in support of authorization for imposing civil money penalties for violations of laws, rules, and orders. A monetary penalty tied to a violation can give an agency the flexibility it needs to secure compliance by individuals or institutions. Presently, an agency is often faced with the option of having to ignore a violation or imposing a penalty it often considers to be overkill.* A cease-and desist action against an institution or referral of a possible criminal action may be too severe for the criticized action. *Daily money penalties should serve as deterrents to violations of laws, rules, regulations, and orders of the agencies. The bill, for example, provides civil money penalties for violations of:*

1. Section 22 and 23A of the Federal Reserve Act. These sections place limitations on loans by member banks to affiliates and on loans to member bank insiders;

2. Section 19 of the Federal Reserve Act. This section prescribes limitations on the rate of interest paid on deposits and sets reserve requirements for member banks;

3. *The National Banking Act. This act sets the standards for operating national banks*;

4. The Bank Holding Company Act and the Savings and Loan Holding Company Act;

5. Insider loan limitations of state nonmember banks;

6. Final cease-and-desist orders issued by the financial institution regulatory agencies;

7. The nonpreferential loan requirements of Title VIII of the bill;

8. The change in bank or savings and loan control titles of the bill.

The committee has provided that civil money penalties will take effect upon enactment and will only apply to violations which occur after that date. In addition, the provisions require that the penalties may only be assessed and collected by written notice with the opportunity for a hearing under the Administrative Procedure Act and with the right to appeal a decision to the U.S. Circuit Court of Appeals. *There is also a requirement that the agency, in determining the amount of the penalty to be assessed "shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good*

faith of the institution or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Your committee believes that these requirements will assure that the agencies are not arbitrary and capricious in their use of civil money penalties.

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 17-18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 and 9289-90. (Emphasis added).

Considering that 12 U.S.C. § 93(b) was enacted to give the Comptroller of Currency power to act against directors or officers of a national bank, the court finds that if a private right of action was intended by Congress it would have expressly provided for one. Since no such provision was enacted and evidence of a contrary intent exists, the court holds that no private right of action may be maintained under 12 U.S.C. §93(b). *See*: *Cort v. Ash, supra.* Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 C.F.R. § 1.4 is granted.

Next, Marx claims that the defendants violated 12 U.S.C. § 375b which provides as follows:

(1) No member bank shall make any loan or extension of credit in any manner to any of its executive officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of

which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title, shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person to all political or campaign committees the funds or ser-

vices of which will benefits such executive officer, director, or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank may pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons—

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State;

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act, or with any other subsidiary of such bank holding company;

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act, or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

(7) The Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

Since the statute is not a provision of chapter 2 of the National Banking Act, a private right of action may not be maintained under 12 U.S.C. § 93(a).[4] Therefore, the

4. The statute is contained in chapter 3.

first question presented by Marx's claim is whether a private right of action may be maintained at all. For the reasons which follow the court holds the question should be resolved in the negative.

Similar to 12 U.S.C. § 93(b), 12 U.S.C. § 375b was added to the National Banking Act by the Financial Institutions Regulatory and Interest Rate Control Act of 1978. Pub. L. No. 95-630, Title I, § 104, 92 Stat. 3644 (1978). The legislative history which concerns enactment of the statute provides in pertinent as follows:

> Section 104 would amend section 22 of the Federal Reserve Act and place additional restrictions on loans to executive officers, directors and persons who directly or indirectly own or control more than 10 percent of the voting shares of a member bank. The amendment would prohibit loans to an executive officer or 10 percent stockholder (except that this percentum is 18 percent for banks located in communities with less than 30,000 in population), companies controlled by such person, or his political or campaign committees, where the amount of the loan, when aggregated with all other loans outstanding to such person, his controlled companies and his political or campaign committees, would exceed the limits on loans to a single borrower established by section 5200 of the Revised Statutes (10 percent of the capital and surplus of the bank). This limit would be made to apply to national banks and State member banks alike. The amendment would also require the approval of a majority of the Board of Directors of a member bank before a loan could be made by the bank to an executive officer, a director or a 10 percent stockholder, to any company controlled by such a person or to any political or campaign committee of such a person,

where the amount of the loan, when aggregated with all other loans outstanding to such person, his controlled companies and his political or campaign committee, would exceed $25,000. In the case of an executive officer these requirements would be an addition to the existing requirements established by section 22(g) of the Federal Reserve Act. All loans to executive officers, directors and 10 percent stockholders, to companies controlled by such persons and to political or campaign committees of such persons, must be made on substantially the same terms as those prevailing at the time for comparable transactions with other persons.

Member banks would be prohibited from honoring overdrafts of executive officers or directors unless the payment of the overdraft is tied to a written preauthorized extension of credit to such officer or director or to a written preauthorized transfer of funds from another account of such officer or director at the bank. *The Board of Governors would be authorized to prescribe rules and regulations to effectuate the purposes and to prevent evasions of this section, as well as to establish a time period within which bank loans currently outstanding shall be reduced so as to conform to the limitations of this section.*

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 39, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 at 9311. (Emphasis added). Upon enactment, a private right of action for violations of certain provisions of chapter 3 of the National Banking Act was recognized under 12 U.S.C. § 503 which provides as follows:

If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate

> any of the provisions of sections 375, 375a, and 376 of this title or regulations of the board made under authority thereof, or any of the provisions of sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

See, e.g., Hometowne Builders, Inc. v. Atlantic National Bank, 477 F. Supp. 717 (E.D. Vir. 1979). Rather than amend this statute to include violations of 12 U.S.C. § 375b, however, Congress enacted 12 U.S.C. § 504 which provides in pertinent part as follows:

> (a) Any member bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, *375b,* 376 or 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: Provided, That the agency having authority to impose a civil money penalty, may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a national bank, or the Board in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(Emphasis added). Once again similar to 12 U.S.C. § 93(b), the legislative history of 12 U.S.C. § 504 indicates that Congress intended to strengthen the powers of various federal agencies charged with enforcement of the National Banking Act as opposed to creation of new private rights of action:

> *Section 101 adds a new section to the Federal Reserve Act which would authorize the Board of Governors, in the case of member banks, and the Comptroller of the Currency, in the case of national banks, to assess civil money penalties against a member or national bank, or an individual participating in the affairs of such a bank, for any violation of sections 22 or 23A of the Federal Reserve Act.* These sections limit loans to insider and affiliates of the bank. *A civil money penalty of not more than $1,000 per day for each violation may be assessed after notice and consideration of the appropriateness of the penalty with respect to the financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations and the data, views and arguments of the bank or person against whom such civil penalty may be assessed. The person assessed is given a right to an agency determination based on a hearing on the record subject to appeal to a circuit court of appeals.*

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 38, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 at 9310. Considering that a private right of action may be maintained under 12 U.S.C. § 503 for violations of 12 U.S.C. §§ 375, 375a and 376, the court finds that if a private right of action under 12 U.S.C. § 375b was intended by Congress, it would have expressly provided for one by including it in the list contained in 12 U.S.C. § 503. Since no such inclusion was made and evidence of a contrary intent

exists, as contained in the enactment and legislative history of 12 U.S.C. § 504, the court holds that no private right of action may be maintained under 12 U.S.C. § 375b. Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 375b is granted.[5]

Next, Marx claims that the transaction in which Centran sold five hundred thousand (500,000) shares of preferred stock to MMBI for $70,000,000 is violative of 12 U.S.C. § 1842(d). Marx claims further that a private right of action for violations of this statute exists under 12 U.S.C. § 1847. For the reasons which follow the court holds Marx's claims to be without merit.

12 U.S.C. § 1847 provides as follows:

> (a) Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18

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5. The court notes that even if a private right of action was implied under 12 U.S.C. § 375b the defendants' joint motion for summary judgment would remain meritorious because, as the court has found previously, neither the debt incurred, nor the securities purchased by CNB, constituted loans or extensions of credit to Centran.

(b)(1) Any company which violates or any individual who participates in a violation of any provision of this chapter, or any regulation or order issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the Board may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under authority of this subsection. The penalty may be assessed and collected by the Board by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Board shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the company or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The company or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in section 1848 of this title. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) If any company or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the Board, the Board shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(5) The Board shall promulgate regulations establishing procedures necessary to implement this subsection.

(6) All penalties collected under authority of this subsection shall be covered into the Treasury of the United States.

Marx has not cited and this court is unaware of any decision which holds that a private right of action may be maintained under this statute. It is unquestioned, however, that courts have held to the contrary. *See: State of South Dakota v. National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970, 85 S. Ct. 667 (1965). *See also: Quaker City National Bank v. Hartley*, 533 F. Supp. 126 (S.D. Ohio 1981). The court has examined these decisions and finds them persuasive. Therefore, the court holds that no private right of action exists under 12 U.S.C. § 1847 for violations of 12 U.S.C. § 1842(d).

Assuming, however, that an action could be maintained under 12 U.S.C. § 1847, Marx's claim would be without merit. 12 U.S.C. § 1842(d) provides as follows:

Notwithstanding any other provision of this section, *no application* (except an application filed as a

> result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) *shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.* For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

(Emphasis added). Under the statute a bank holding company such at MMBI may not ". . . acquire, directly or indirectly, any voting shares of, interest in, or all of substantially all of the assets of any additional bank [CNB] located outside of the State [New York] in which the operations of . . . [MMBI are] principally conducted . . . unless the acquisition of such shares or assets . . . is specifically authorized by the statute laws of the State in which such bank is located [Ohio], by language to that effect and not merely by implication." Although the statutory proscription is unquestioned, it is clear that it does not apply to the present case because MMBI acquired stock in Centran, a "bank holding company" as

defined in 12 U.S.C. § 1841(a)(1)[6] and not in CNB, a "bank" as defined in 12 U.S.C. § 1841(c).[7] Accordingly, the defendants' joint motion for summary judgment on Marx's claims under 12 U.S.C. §§ 1847 and 1842(d) is granted.

The following assertion is contained in the Stipulations of Fact submitted by the parties: "Plaintiff hereby notifies the Court and the defendants that he intends to add the claim that the actions of the defendants violated 12 U.S.C. § 371c." Stipulations of Fact, p. 10. Similarly, in Marx's Brief in Opposition to Defendants' Motion for

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6. 12 U.S.C. § 1841(a)(1) provides as follows:

> Except as provided in paragraph (5) of this subsection, "*bank holding company*" *means any company which has control over any bank* or over any company that is or becomes a bank holding company by virtue of this chapter.

(Emphasis added).

7. 12 U.S.C. § 1841(c) provides as follows:

> "*Bank means any institution* organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, *which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.* Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia. The term "bank" also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively is providing services for other depository institutions and their officers, directors, and employees.

(Emphasis added).

Partial Summary Judgment, he asserts that on February 6, 1971, when CNB became a wholly-owned subsidiary of Centran, the directors failed to disclose "the pre-emptive rights status of Centran stock" in violation of 15 U.S.C. §§ 77[8] and 78j.[9] The court construes these assertions as if they were plead properly in a motion to amend the complaint. For the reasons which follow such motion is denied.

Fed. R. Civ. P. 15(a) provides as follows:

> Amendments. A party may amend his pleading once as a matter of course at any time before a respon-

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8. 15 U.S.C. § 77q(a) provides as follows:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

9. 15 U.S.C. § 78j(b) provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

See also: 17 C.F.R. § 240.10b-5, commonly known as rule 10b-5.

> sive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. *Otherwise a party may amend his pleading only by leave of court* or by written consent of the adverse party; *and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(Emphasis added). In *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962), the United States Supreme Court held that to avoid decisions on the merits because of procedural technicalities is contrary to the spirit of the Federal Rules of Civil Procedure and that the leave to amend "shall be freely given when justice so requires" language of Rule 15(a) is a "mandate to be heeded." 371 U.S. at 182, 83 S. Ct. at 230. The Court held further that such determinations are within the discretion of a district judge and that leave to amend a pleading may be denied if premised on certain reasons such as "futility of amendment":[10]

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought

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10. *See*: *Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir.), *cert. denied*, 416 U.S. 939, 94 S. Ct. 1942 (1974), in which the Court of Appeals for the Sixth Circuit held that a misconception of law is no excuse for a late presentation of an alternative theory of recovery. In *Troxel*, the court held specifically that to deny a patent licensee's motion to amend its pleadings to assert an alternative ground for recovery, when the only excuse offered for failing to present the theory was that the licensee misconceived the law that was applicable, was not abuse of discretion.

> to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—*such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment,* etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. (Emphasis added). For the reasons which follow the court finds that amendment of the complaint in this case would be futile.

Like 12 U.S.C. § 375b, 12 U.S.C. § 371c is not a provision of chapter 2 of the National Banking Act and, therefore, a private right of action may not be maintained under 12 U.S.C. § 93(a). Once again similar to 12 U.S.C. § 375b, the mandates of 12 U.S.C. § 371c are enforced by the Comptroller of Currency and the Board of Governors of the Federal Reserve Board under 12 U.S.C. § 504. Therefore, and for the reasons set out above in the portion of this Memorandum of Opinion which concerns whether a private right of action may be maintained under 12 U.S.C. § 375b, the court holds that a private right of action may not be maintained under 12 U.S.C. § 371c.

Assuming, however, that an action could be maintained under 12 U.S.C. § 371c, Marx's claim would be without

merit. 12 U.S.C. § 371c provides in pertinent part as follows:

> (a) Restrictions on transactions with affiliates—
>
> (1) A member bank and its subsidiaries may engage in a covered transaction with an affiliate only if—
>
> (A) in the case of any affiliate, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 10 per centum of the capital stock and surplus of the member bank; and
>
> (B) in the case of all affiliates, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 20 per centum of the capital stock and surplus of the member bank.

Under 12 U.S.C. § 371c(b)(1)(A), the term "affiliate" is defined in part as "any company that controls the member bank," (*i.e.*, Centran), and under 12 U.S.C. § 371c(b)(7), the term "covered transaction" is defined in part as "a loan or extension of credit to the affiliate." Although it is unquestioned that in all instances other than those for which exceptions are provided in subsections (a)(1)(A) and (B), 12 U.S.C. § 371c would prohibit loans from CNB to Centran, it is equally clear that the statute does not apply to the present case. As this court held when considering Marx's claims under 12 U.S.C. §§ 84 and 375b, to construe either the debt incurred or the securities purchased as "loans" from CNB to Centran is inconceivable. CNB merely borrowed funds funds from other banks, used such funds to invest in securities and, thereafter, suffered losses. It is undisputed that Centran was not a party to any of these transactions. Such facts simply cannot be construed

as a "loan or extension of credit" from CNB to Centran. Accordingly, Marx's motion to amend the complaint to include a claim under 12 U.S.C. § 371c is denied.

Marx also claims that the defendant directors committed certain securities law violations in 1971. Since the Court of Appeals for the Sixth Circuit has held consistently that Ohio's four (4) year statute of limitations[11] for actions in which fraud is alleged applies to claims under section 10b of the Securities Exchange Act of 1934 and section 17a of the Securities Act of 1933," *Connelly v. Balkwill*, 279 F.2d 685 (6th Cir. 1960), in which the statute was applied without discussions; *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S. Ct. 813 (1977); *Carothers v. Rice*, 633 F.2d 7, 13 (6th Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S. Ct. 1702 (1981); *Herm v. Stafford*, 663 F.2d 669, 678, n. 10 (6th Cir. 1981), Marx's claims are barred. Accordingly, Marx's motion to amend the complaint to include claims under 15 U.S.C. §§ 77q and 78j(b) is denied.

Premised on the reasons delineated above the defendants' joint motion for partial summary judgment on

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11. OHIO REV. CODE ANN. § 2305.09 (Page 1962). The statute provides as follows:

> *An action for any of the following causes shall be brought within four years after the cause thereof accrued:*
>
> (A) For trespassing upon real property.
>
> (B) For the recovery of personal property, or for taking or detaining it.
>
> (C) *For relief on the ground of fraud;*
>
> (D) For an injury to the rights of plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.
>
> If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

(Emphasis added).

count one of the amended complaint is granted. *See*: Fed. R. Civ. P. 56(c); *Smith v. Hudson*, 600 F.2d 60 (6th Cir.), *cert. denied*, 444 U.S. 986, 100 S. Ct. 495 (1979). Further, the court holds that since the defendants did not violate any of the provisions of the National Bank Act for which Marx may maintain a private right of action, it is axiomatic that they are entitled to judgment on the derivative claims alleged as well. Therefore, the only issue which remains for the court is subject matter jurisdiction over the claims raised by count three of Marx's amended complaint in which he alleges that the defendants breached their fiduciary duties to shareholders under the laws of Ohio. For the reasons which follow such claims are dismissed without prejudice.

As reasoned by the United States Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966), the concept of pendent jurisdiction permits adjudication of claims under state law in conjunction with claims under federal law, if such claims derive from operative facts that are common or are of such a nature that the parties would be expected to litigate them in one proceeding. Whether pendent jurisdiction applies to a claim is discretionary, *United Mine Workers of America v. Gibbs, supra; Coleman v. Casey County Bd. of Edn.*, 686 F.2d 428 (6th Cir. 1982), and in making such a determination a court must engage in "a balancing of the considerations of comity, fairness to the litigants, judicial economy, and the avoidance of needless decisions of state law." *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 809 (2d Cir. 1979). It is unquestioned that if "the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to

state tribunals." *United Mine Workers of America v. Gibbs, supra,* 383 U.S. at 726-727, 83 S. Ct. at 1139. It is equally clear that "if the federal claims are dismissed before trial . . . *the state claims should be dismissed as well.*" *Id.* at 726, 83 S. Ct. at 1139. (Footnote omitted). (Emphasis added). The court finds *United Mine Workers of America v. Gibbs, supra,* dispositive of count three of Marx's complaint.

Accordingly, the defendants' joint motion for partial summary judgment is granted; the plaintiff's motion "to limit [the] scope" of the defendants' motion is denied and the remainder of the amended complaint is dismissed.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

STATUTES AND REGULATIONS INVOLVED

12 U.S.C. § 1

§ 1. Bureau of Comptroller of the Currency

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, except for the cancellation and destruction and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury. As amended May 20, 1966, Pub.L. 89-427, § 1, 80 Stat. 161.

12 U.S.C. § 24(7)*

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such in-

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*Amendments have not been included, in that they are not relevant, nor have they altered the law upon which Petitioner relies.

cidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing

for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of subchapters I, II, and III of chapter 7 of this title, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation, or obligations which are insured by the Federal Housing Administrator pursuant to section 1713 of this title, if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States, or obligations of national mortgage associations: *Provided*, That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus.

12 U.S.C. § 82

§ 82. Limit on indebtedness incurred by bank

No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Monies deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

Sixth. Liabilities incurred under the provisions of chapter 14, of Title 15, Commerce and Trade.

Seventh. Liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad.

Eighth. Liabilities incurred under the provisions of sections 1031-1034 of this title.

Ninth. Liabilities incurred on account of loans made with the express approval of the Comptroller of the Currency under paragraph (9) of section 84 of this title.

Tenth. Liabilities incurred under the provisions of section 352a of this title. R.S. § 5202; Dec. 23, 1913, c. 6, § 13, 38 Stat. 264; Sept. 7, 1916, c. 461, 39 Stat. 753; Apr. 5, 1918, c. 45, § 20, 40 Stat. 512; Oct. 22, 1919, c. 79, § 2, 41 Stat. 297; Mar. 4, 1923, c. 252, Title V, § 504, 42 Stat. 1481; Feb. 25, 1927, c. 191, § 11, 44 Stat. 1231; Jan. 22, 1932, c. 8, § 6, 47 Stat. 8; May 20, 1933, c. 35, § 2, 48 Stat. 73; June 19, 1934, c. 653, § 2, 48 Stat. 1107.

§ 82. Repealed. Pub.L. 97-320, Title IV, § 402, Oct. 15, 1982, 96 Stat. 1510.

12 U.S.C. § 84(8)*

§ 84. Limit of liability of any person to bank

The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount

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*Amendments have not been included, in that they are not relevant, nor have they altered the law upon which Petitioner relies.

of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. Such limitation of 10 per centum shall be subject to the following exceptions:

(8) Obligations of any person, copartnership, association, or corporation in the form of notes secured by not less than a like amount of bonds or notes of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States, shall (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

12 U.S.C. § 93

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to

violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates any of the provisions of this title, or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request

made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

As amended Nov. 10, 1978, Pub.L. 95-630, Title I, § 103, 92 Stat. 3643; Oct. 15, 1982, Pub.L. 97-320, Title IV, § 424 (d)(3), (f), (g), 96 Stat. 1523; Oct. 15, 1982, Pub.L. 97-320, Title IV, § 424(g), as amended Jan. 12, 1983, Pub.L. 97-457, § 24, 96 Stat. 2510.

12 U.S.C. § 1842(d)

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1849(a)

(a) General rule. Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct, except as specifically provided in this section.

31 U.S.C. § 3102

§ 3102. Bonds

(a) With the approval of the President, the Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds under section 3111 of this title [31 USCS § 3111]. The Secretary may issue bonds authorized by this section to the public and to Government accounts at any annual interest rate and prescribe conditions under section 3121 of this title [31 USCS § 3121]. However, the face amount of bonds issued under this section and held by the public with interest rates of more than 4.25 percent a year may not be more than $110,000,000,000.

(b) The Secretary shall offer the bonds authorized under this section first as a popular loan under regulations of the Secretary that allow the people of the United States as nearly as possible an equal opportunity to participate in subscribing to the offered bonds. However, the bonds may be offered in a way other than as a popular loan when the Secretary decides the other way is in the public interest.

(c)(1) When the Secretary decides it is in the public interest in making a bond offering under this section, the Secretary may—

(A) make full allotments on receiving applications for smaller amounts of bonds to subscribers applying before the closing date the Secretary sets for filing applications;

(B) reject or reduce allotments on receiving applications filed after the closing date or for larger amounts;

(C) reject or reduce allotments on receiving applications from incorporated banks and trust companies for their own account and make full allotments or increase allotments to other subscribers; and

(D) prescribed a graduated scale of allotments.

(2) The Secretary shall prescribe regulations applying to all popular loan subscribers similarly situated governing a reduction or increase of an allotment under paragraph (1) of this subsection.

(d) The Secretary may make special arrangements for subscriptions from members of the armed forces. However, bonds issued to those members must be the same as other bonds of the same issue.

(e) The Secretary may dispose of any part of a bond offering not taken and may prescribe the price and way of disposition.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 938; Jan. 12, 1983, P.L. 97-452, § 1(5), 96 Stat. 2467.)

12 C.F.R. § 1.4

§ 1.4 Type I securities; standards for authorized transactions.

Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 or in this Part other than §§ 1.3(c), 1.3(g), 1.4, 1.8, 1.9, and 1.11. Consequently, a bank may deal in, underwrite, purchase, and sell for its own account a security of Type I subject only to the exercise of prudent banking judgment. Prudence will require such determinations as are appropriate for the type of transaction involved. For the purpose of underwriting or investment, prudence will also require a consideration of the resources and obligations of the obligor and a determination that the obligor possesses resources sufficient to provide for all required payments in connection with the obligations.

[36 FR 6737, Apr. 8, 1971]

12 C.F.R. § 7.1130

§ 7.1130 Sale of Federal Reserve funds to another bank.

When a bank purchases Federal Reserve funds from another bank, the transaction ordinarily takes the form of a transfer from a seller's account in a Federal Reserve Bank to the buyer's account therein, payment to be made by the purchaser, usually with a specified fee. The transaction does not create on the part of the buyer an obligation subject to 12 U.S.C. 84 or a borrowing subject to 12 U.S.C. 82, but is to be considered a purchase and sale of such funds. But see § 7.7365 for federal funds transactions between affiliates.

12 C.F.R. § 7.1131

§ 7.1131 Purchase or sale of securities: resale or repurchase agreement.

The purchase or sale of securities by a bank, under an agreement to resell or repurchase at the end of a stated period is not a borrowing subject to 12 U.S.C. 82 nor an obligation subject to the lending limit of 12 U.S.C. 84.

12 C.F.R. § 7.7518

§ 7.7518 Bank indebtedness; Federal funds, securities repurchase agreements, Federal Reserve bills payable.

For purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal funds purchased (see § 7.1130) obligations to repurchase securities sold (see § 7.1131), or bills payable to the Federal Reserve (12 U.S.C. 82(5)). Accordingly, for purposes of § 14.5(b) of this chapter, a national bank's indebtedness or liability is determined without regard to such items. Also see §§ 7.7355 and 7.7530.